

CURRENT DEVELOPMENTS

Responsibility-sharing for refugees (1)

Law's production of superfluity as an analytical lens

DANA SCHMALZ — 7 September, 2016



When the German Minister of the Interior a few weeks ago announced that “the refugee crisis has not been resolved, but its solution is on a very good way”, he was obviously not speaking about the global situation. He was referring to the situation in Europe and particularly in Germany, where after the successive closure of the Balkan route and the agreement between the EU and Turkey in March (as discussed here), the number of persons arriving has dropped significantly. On the global level, UNHCR counts more than 65 million displaced persons. And while European policies place a strong emphasis on the “securization of external borders” and “reducing incentives of irregular migration” (cf. here), the

European share in receiving refugees is minor in comparison: 94 percent of the world's forcibly displaced find shelter outside Europe, by far most of them in the Global South. The situation of refugees worldwide involves numerous sites that receive little attention, and numerous protracted refugee situations, in which persons remain in a state of displacement for years if not for generations.

Under those conditions, solutions for refugees that exclude from view the question of responsibility-sharing must appear shortsighted. I will not address here the issue of inner-European responsibility-sharing, which exhibits many parallel features, but only speak about responsibility-sharing on the global level. Four aspects thereby interrelate: the highly unequal distribution of responsibility for refugees, increasing tendencies of border securization and externalization of migration control, the shortcomings in guaranteeing refugee rights in many places, and the role of humanitarian agencies in protection. My interest in this two-part blog article will be to sketch some ideas how the notion of “law’s production of superfluity”, as Susan Marks has introduced it, might provide a helpful lens for understanding those interdependencies and how it might inform our reflections about global responses to the cause of refugees.

Responsibility-sharing and the question of access to territory

Mobility, or more specifically the access to territory, constitutes a crucial aspect in the plight of refugees. As Hannah Arendt seminally formulated, it is not so much the “loss of a home but the impossibility of finding a new one” (OT, 293), which stands at the basis of their particular condition of rightlessness. Arendt’s analysis at the same

time describes the dilemma of law as a means for improving the situation of refugees: Since rights by nature depend on the relationship between persons, rights imagined as universal are likely to be ineffective exactly the moment they would be needed the most. This dilemma of rights at the borders of political communities becomes manifest when states on the one hand uphold differentiated regimes of refugee rights, while at the same time employing measures to hinder persons from entering the territory where they can claim these rights. The Southern borders of the European Union constitute one site in which this is visible today; similar situations occur at the shores of Australia, or the Southern border of the United States.

But the question of access to territory not only plays a role in the relationship between individuals seeking protection and the respective states; it equally works to distribute responsibility for refugees between states. Among the instruments by which powerful states continue to shift responsibility for refugees to less powerful states are measures of border surveillance and physical barriers, as well as legal instruments such as the notion of safe third countries and corresponding readmission agreements. The successive development of non-entrée regimes by states of the Global North has long been criticized, and it has been pointed out how it contributes to an downward spiral in the quality of refugee protection world-wide, diminishing the willingness of refugee receiving states in the Global South to guarantee refugee rights and allow local integration.

Law's production of superfluity

The living conditions of refugees in the Global South thus cannot be regarded in detachment from questions of

responsibility-sharing and border regulation. This works in both directions: poor conditions and opportunities for refugees in neighboring regions of their states of origin will cause many to travel onwards, prompting new debates about migration control. In that vein, it was only the arrival of Syrian refugees in Europe and the realization that persons were willing to take this journey despite the many obstacles and perils, which prompted an increase in support of refugee assistance in Jordan and the Lebanon, “to stem the exodus”.

More important even seems how the regulation of access in one part of the world impacts on conditions of protection in other parts, far beyond the immediate presence of persons: This became apparent when a few days after the EU-Turkey agreement, Kenya – already for decades one of the largest refugee receiving state – declared that it would close the Dadaab refugee camps, which have hosted at times more than 400.000 Somalian refugees. In light of the fact that the European Union was well willing to pay for not receiving a substantive number of refugees, and for not being directly confronted with a gross dilemma regarding its fundamental values, assuming the task to provide for refugees without such return service suddenly seemed much less evident. (For the current debate about the closure of Dadaab cf. e.g. here and here.) In that sense, we can view policies of border securization and deterrence to work as communications beyond direct legal agreements. We find several examples recently for this logic of trading (the non-arrival of) refugees. It found most clear expression when the President of Turkey, discontented about the implementation of the agreement, threatened to “flood Europe with migrants”. The idea that one could threaten a continent with migrants did not seem to surprise as such, rather it captured the reasoning of the agreement.

Trying to understand how this logic assumes a wider significance, Susan Marks' notion of "(the production of) superfluity" might offer an analytical tool: Marks suggests that legal rules can contribute to frame social interrelations in such a way as to "produce superfluity", meaning the perception of persons as unneeded and dispensable, their mere existence being a problem, or outright threat. This perception as superfluous must thereby in no way correspond to persons actually not being needed (as in the case of Europe, demographers and economists have kept asserting that there is demand for immigration). Legal arrangements that construe refugees as costs to be traded, and the effect that has for the willingness to receive refugees elsewhere, constitute one example for how measures aimed at "solutions" also contribute to the problem. More generally, we can analyze through that lens of a legal production of superfluity the conditions of access to territory: Border regulations and restrictions on mobility will regularly work to concentrate on few routes persons, which in turn are perceived as "uncontrollable masses", and as such become a factor in renewed debates about the need for border regulation.

Humanitarian reason in refugee protection

The legal production of superfluity also corresponds with the perplexities of a "humanitarian reason" in refugee protection. This is not identical with but links to the increasing role that humanitarian agencies play in international protection: Since the 1950s, UNHCR together with governmental and non-governmental partner organizations became engaged in material assistance to refugees, in particular in states of the Global South. This engagement in material assistance continuously grew over the years, fueled by (and contributing

to) the question of responsibility-sharing: As states neighboring regions of conflict felt left alone with the task to provide for protection, humanitarian actors assumed an ever growing part in assisting refugees, amounting to a situation in which UNHCR is described as a “surrogate state” for refugees.

The arising constellation can be seen as triangular relationship between host states, which continue to accept refugees to their territory, humanitarian agencies, which – often in refugee camps – provide for shelter and basic needs, and donor states, which contribute monetarily. It has a self-reinforcing tendency: As donor states are interested that refugees remain in their regions of origin, the work of humanitarian agencies will uphold the highly unequal numbers of refugees hosted in different parts of the world. The need for funding thereby incentivizes a separation of refugees from the general population and a restriction of their mobility, as persons have to be clearly visible and locatable. And the lacking possibility of local integration and limitations on social and economic rights in turn contribute to a continuous dependence of refugees on aid, fostering the perception as burden. A humanitarian reason in protection thus tends to – while ensuring immediate relief – also perpetuate the status of persons as refugees and dependent.

This is the first part of two posts on the question of global responsibility-sharing. A second post addresses the debate on “global solutions” for refugees.

Dana Schmalz is a co-editor of the blog and currently an LL.M-student at the Cardozo School of Law.

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